A

PERWIRA AFFIN BANK BHD

v.

MAHANY SAWAL

B

COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF PCA
AZHAR MA'AH JCA
APANDI ALI JCA
[CIVIL APPEAL NO: S-03-234-2009]

C

20 JULY 2012

BANKRUPTCY: *Notice - Setting aside - Appeal against - Whether bankruptcy notice ambiguous and defective - Recovery of interest in respect of judgment debt - Whether caught by limitation period of three years - Sabah Limitation Ordinance, Schedule Item 45 - Bankruptcy notice an action or proceeding based on a judgment - Whether governed by Item 98 of Schedule to Ordinance*

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On 6 August 1998, the appellant judgment creditor ('JC') filed a bankruptcy notice ('BN') against the respondent judgment debtor ('JD') based on a judgment dated 24 March 1988 ('judgment'). The JC also obtained an order dated 23 March 1998 ('the said Order') for leave to execute the said judgment. On 7 April 1999, the JC filed an amended BN against the JD, demanding for the payment of debt which included the sum of RM6,743,267.39 being the interest calculated from 1 May 1985 until 6 August 1998. The JD filed an application to set aside the BN which was duly heard and dismissed by the deputy registrar. The JD appealed against the deputy registrar's decision which was allowed by the Judicial Commissioner. Hence, the JC appealed against the decision of the Judicial Commissioner. The JC submitted that the Judicial Commissioner, having correctly found that the limitation period for actions based on a judgment was 12 years under Item 98 of the Schedule to the Sabah Limitation Ordinance, had erred in fact and in law when she went on to hold that the recovery of interest due on the judgment was caught by Item 45 of the Schedule to the Ordinance, which imposed a time bar in relation to suits for recovery of interest prior to judgment (*Chin Sin Lan v. Delta Finance Bhd*). The issues that arose were (i) whether Item 45 or Item 98 of the Schedule to the Ordinance was applicable in calculating the limitation period and (ii) whether the parties were subjected to the three years cap as spelled out by Item 45 of the Schedule to the Ordinance.

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Held (allowing the appeal with costs)
Per Raus Sharif PCA delivering the judgment of the court:

(1) The salient provision of Item 45 clearly speaks of a claim for interest upon money due from the defendant to the plaintiff and the limitation period that is attached to it is three years. Item 98 on the other hand deals with judgment obtained and the limitation period that is attached to it is 12 years. In the present case, the BN was not an action for money payable for interest upon money due, but rather an action or proceeding based on a judgment. Thus it must be governed by Item 98. (para 19)

(2) There should not be a bar to the JC's claim for interest in bankruptcy cases outside the period of three years. Since there were no provisions in the Ordinance for any period of limitation for interest in respect of a judgment debt, the only applicable provision would be Item 98; which allowed for a period of 12 years within which to bring a suit upon a judgment. Since the BN here was a suit upon the judgment and the claim for interest in the BN was made in 1998, which was only ten years after the date of judgment, it was well within the limitation period. (paras 20 & 23)

Bahasa Malaysia *Translation Of Headnotes*

Pada 6 Ogos 1998, perayu pemiutang penghakiman ('JC') telah memfailkan notis kebankrapan ('BN') terhadap responden penghutang penghakiman ('JD'), berdasarkan penghakiman bertarikh 24 Mac 1988 ('penghakiman'). JC juga telah memperolehi perintah bertarikh 23 Mac 1998 ('perintah tersebut') untuk kebenaran melaksanakan penghakiman tersebut. Pada 7 April 1999, JC telah memfailkan satu BN yang telah dipinda terhadap JD menuntut pembayaran hutang termasuk RM6,743,267.39 iaitu faedah yang dikira dari 1 Mei 1985 sehingga 6 Ogos 1985. JD memfailkan permohonan untuk mengenepikan BN yang telah ditolak oleh timbalan pendaftar. JD merayu terhadap keputusan timbalan pendaftar dan ini telah dibenarkan oleh Pesuruhjaya Kehakiman. Oleh itu, JC merayu terhadap keputusan Pesuruhjaya Kehakiman. JC berhujah bahawa Pesuruhjaya Kehakiman, yang dengan betul telah memutuskan bahawa tempoh had masa bagi tindakan berdasarkan penghakiman adalah 12 tahun di bawah Item 98 Jadual kepada Ordinan Had Masa Sabah, telah terkhilaf dari

segi fakta dan undang-undang apabila beliau memutuskan bahawa mendapatkan faedah yang harus dibayar menurut penghakiman disiratkan oleh Item 45 Jadual kepada Ordinan, yang mengenakan had masa berhubungan tindakan mendapatkan faedah sebelum penghakiman (*Chin Sin Lan v Delta Finance Bhd*). Isu-isu yang timbul adalah (i) sama ada Item 45 atau Item 98 Jadual kepada Ordinan digunapakai dalam mengira tempoh had masa dan (ii) sama ada pihak-pihak telah tertakluk kepada had tiga tahun seperti yang dinyatakan oleh Item 45 Jadual kepada Ordinan.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Peruntukan penting Item 45 dengan jelasnya memperuntukkan mengenai tuntutan faedah terhadap wang yang terhutang oleh defendan kepada plaintif dan tempoh had masa yang dinyatakan adalah tiga tahun. Item 98 sebaliknya menyentuh penghakiman yang diperolehi dan, tempoh had masanya adalah 12 tahun. Dalam kes ini, BN bukan tindakan untuk wang yang kena dibayar untuk faedah atas wang yang terhutang, tetapi adalah tindakan atau prosiding berdasarkan penghakiman. Oleh itu, ia dikawalselia oleh Item 98.

(2) Tiada had yang sepatutnya dikenakan ke atas tuntutan JC bagi faedah dalam kes-kes kebankrapan di luar tempoh tiga tahun. Oleh kerana tiada peruntukan-peruntukan di dalam Ordinan untuk apa-apa tempoh had masa bagi faedah berkenaan dengan hutang penghakiman, oleh itu peruntukan yang boleh digunapakai adalah Item 98; yang membenarkan tempoh 12 tahun dalam mana untuk membawa guaman ke atas penghakiman. Memandangkan BN adalah tindakan ke atas penghakiman dan tuntutan faedah dalam BN dibuat pada tahun 1998, iaitu hanya 10 tahun selepas tarikh penghakiman, ia adalah dalam tempoh had masa.

Case(s) referred to:
Chin Sin Lan v. Delta Finance Bhd [2004] 3 CLJ 113 CA ***(refd)***
Fawzia Osman v. Bank Bumiputra (M) Bhd [1991] 1 CLJ 652; [1991] 1 CLJ (Rep) 113 SC ***(refd)***
Low Mun v. Chung Khiaw Bank Ltd [1987] 2 CLJ 400; [1987] CLJ (Rep) 172 SC ***(refd)***
Perwira Affin Bank Bhd v. Lim Ah Hee [2004] 2 CLJ 787 FC ***(refd)***
Re Lim Szu Ang, Ex p Kewangan Utama Bhd [2005] 7 CLJ 23 HC ***(refd)***

Re Yau Kin Mun, Ex p Public Bank Bhd [1999] 3 CLJ 412 HC ***(refd)***
Re Yong Tet Yin Ex Parte United Overseas Bank Limited [1996] 1 BLJ 158 HC ***(refd)***
United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin [2002] 2 CLJ 413 FC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 3, 131
Bankruptcy Act 1969, s. 3(1)(i)
Bankruptcy Rules 1969, r. 274
Limitation Act 1953, s. 6(3)
Sabah Limitation Ordinance, Schedule, Items 45, 98

For the appellant - Jeyan Marimuttu (Datuk John Sikayun with him); M/s Luping & Co
For the respondent - Edwin Tsen; M/s Tang Pang Tsen & Co

[Appeal from High Court, Sandakan; Bankruptcy Notice No: 29-171-1998]

Reported by Suhainah Wahiduddin

JUDGMENT

Raus Sharif PCA:

Introduction

[1] This is an appeal by the appellant against the decision of the learned Judicial Commissioner on 26 June 2009, in allowing the respondent's appeal against the decision of the deputy registrar ("registrar"). The registrar had earlier dismissed the respondent's application dated 9 February 1999 to set aside the appellant's bankruptcy notice dated 6 August 1998 with costs.

[2] The appellant is the judgment creditor ("JC") and the respondent is the judgment debtor ("JD"). For convenience, parties will be referred to as JC and JD as in the court below.

Background Facts

[3] The facts that form the core of this appeal may be briefly set out as follows.

[4] On 6 August 1998 the JC filed a bankruptcy notice ("BN") against the JD. The BN was based on the judgment dated 24 March 1988 ("judgment") obtained by JC against the JD under the Kuala Lumpur High Court Suit No. C 23-1737-86 for the judgment sum of RM2,605,828.

[5] The JC had also obtained an order dated 23 March 1998 ("the said order") for leave to execute on the said judgment.

[6] On 7 April 1999 the JC filed an amended BN. In the amended BN the JC demanded for the payment of the debt pursuant to the judgment which includes the sum of RM6,743,267,39, being the interest calculated from 1 May 1985 until 6 August 1998.

[7] On 9 February 1999 the JD filed an application to set aside the BN on various grounds (setting aside application).

[8] On 28 January 2000 the setting aside application was duly heard and dismissed by the learned deputy registrar. The JD appealed against the decision of the deputy registrar.

[9] The learned Judicial Commissioner allowed the appeal by the JD and set aside the JC's amended BN dated 7 April 1999 with costs. Hence this appeal to this court.

[10] The learned Judicial Commissioner in allowing the setting aside of the BN held *inter alia*:

(i) that Item 45 of the Schedule to the Ordinance applies to the present case for the recovery of interest due on the judgment. Item 45 provides a limitation period of three years to recover interest on money due from the defendant to the plaintiff and the time begins to run from when the interest becomes due ie, the date of judgment. (*Perwira Affin Bank Bhd v. Lim Ah Hee* [2004] 2 CLJ 787 FC; *Re Yau Kin Mun, Ex p Public Bank Bhd* [1999] 3 CLJ 412; *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin* [2002] 2 CLJ 413 FC);

(ii) that a bankruptcy proceeding is an action on judgment and by virtue of Item 98 of the Schedule to the Ordinance the limitation period of 12 years applies for the recovery of the principle sum based on the judgment. However the recovery of interest is subjected to Item 45; and

(iii) that the purported BN is defective since it includes a claim for interest outside the three years provided under Item 45 of the Schedule to the Ordinance.

Submissions

[11] Before us learned JC's counsel submitted that the learned Judicial Commissioner having correctly found that the limitation period for action based on judgment is 12 years under Item 98 of the Schedule to the Ordinance erred in fact and in law when she went on to hold that the recovery of interest due on the judgment is caught by Item 45 of the Schedule to the Ordinance.

[12] Learned counsel submitted that Item 45 has no application to bankruptcy proceedings as it is not an action for money payable for interest upon money due, but an action or proceeding based on a judgment which is governed by Item 98. He submitted that Item 45 is clearly not dealing with interest in respect of a judgment debt but merely in relation to a general claim for interest for money due from a defendant. Item 45 imposes a time-bar in relation to a suit for recovery of interest prior to judgment. In support thereof he referred us to the case of *Chin Sin Lan v. Delta Finance Bhd* [2004] 3 CLJ 113 and *Re Catherine L Masry Ex Parte Affin - ACF Finance Berhad* (unreported). He added further that the original action may be an action on money lent on interest which would be caught by Item 45 of the Ordinance; but, however once the judgment is given then all sums due including any interest are merged into the judgment sum. In support thereof he referred us to the unreported case of *Re Johan Hj Abd Hamid, Ex Parte Hong Leong Bank* (Bankruptcy Petition K 29-171-2007).

[13] In this regard learned counsel referred us to s. 3(1)(i) of the Bankruptcy Act 1967 which entitles that the demand in the bankruptcy notice to be made for the entire judgment debt computed to the date of the filing of the bankruptcy notice, ie, one sum which is inclusive of interest to the date of the bankruptcy notice. In a similar breath, learned counsel submitted that even if some of the debt is statute-barred, there is still the principal debt which is more than sufficient to support the bankruptcy notice and consequently the adjudication. (In support thereof he referred us to the case of *Re Yong Tet Yin Ex-Parte United Overseas Bank Limited* [1996] 1 BLJ 158 and *Re Johan Hj Abd Hamid, Ex Parte Hong Leong Bank* (Bankruptcy Petition K 29-171-2007).

[14] Learned JD's counsel conversely submitted that the JC is precluded from claiming interest exceeding three years either from the date of the purported guarantee ie, 24 August 1985 or judgment ie, 24 March 1988 by virtue of Item 45. He submitted that the interest claimed outside the period of three years that is allowed should not have been included. In support thereof he referred us to the case of *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin* [2002] 2 CLJ 413.

[15] Learned counsel further submitted that Item 45 of the Schedule to the Ordinance is of general application and wider in its scope and extends generally to all interest upon money due from the defendant to the plaintiff which cannot be recovered three years after the interest becomes due. To illustrate further learned counsel made comparison to Item 25 to the Indian Limitation Act which is in *pari materia* with Item 45 of the Sabah Limitation Ordinance. Learned counsel submitted that under the Indian Limitation Act, a bank is precluded from claiming interest beyond three years.

[16] Learned counsel also submitted that the BN was bad in law and has no legal effect as it does not quantify the interest payable under the judgment debt as provided under s. 3(1)(i) of the Bankruptcy Act 1969. Counsel highlighted to us that the computation of interest should be based on RM2,605,828 and not "capitalized or compounded" as it had been done in this case. Further to this learned counsel also highlighted to us that the JC had "lumped up" the interest due and owing under the judgment with no details or proof. In this regard learned counsel submitted to us that the sum in the BN must be certain and not ambiguous and if the sums are ambiguous and uncertain such a defect is not a mere irregularity and is not curable. Learned counsel based his arguments by making reference to s. 131 of the Bankruptcy Act 1967; r. 274 of the Bankruptcy Rules 1969; s. 3 of Bankruptcy Act 1967; the cases of *Fawzia Osman v. Bank Bumiputra (M) Bhd* [1991] 1 CLJ 652; [1991] 1 CLJ (Rep) 113 and *Low Mun v. Chung Khiaw Bank Ltd* [1987] 2 CLJ 400; [1987] CLJ (Rep) 172.

Findings

[17] There is no dispute in this case that the BN was based on the judgment sum which includes interest. The issue is whether Item 45 or Item 98 of the Schedule to the Ordinance is applicable

in calculating the limitation period. In other words in claiming for interest on the judgment sum are the parties subjected to the three years cap as spelled out by Item 45. For better understanding, it will be convenient to set out here the provisions of Item 45 and Item 98 to the Schedule of the Ordinance.

[18] Item 45 and Item 98 of the Schedule to the Ordinance reads as follows:

Description of Suit	Period of Limitation	Time from which period begins to run
45. For money payable for Interest upon money due from the defendant to the plaintiff.	3 years	When the interest becomes due.
98. Upon a Judgment obtained in the colony or a recognizance.	12 years	The date of the Judgment or recognizance

[19] We are of the view that the salient provision of Item 45 clearly speaks of a claim for interest upon money due from the defendant to the plaintiff and the limitation period that is attached to it is three years. Item 98 on the other hand deals with judgment obtained; and, the limitation period that is attached to it is 12 years. In the present case, the BN was not an action for money payable for interest upon money due, but rather an action or proceeding based on a judgment. Thus it must be governed by Item 98.

[20] Thus we are unable to agree with the JD's contention that there should be a bar to the JC's claim for interest in bankruptcy cases outside the period of three years. In this regard we are more inclined to accept the JC's contentions that since there are no provisions in the Ordinance for any period of limitation for interest in respect of a judgment debt; hence, the only applicable provision would be Item 98: which allows for a period of 12 years within which to bring a suit upon a judgment. Since the BN here is a suit upon the judgment and the claim for interest in the BN was made in 1998, which is only ten years after the date of the judgment, we find that it is well within the limitation period.

[21] In fact this issue had been dealt with by Tan Chin J in the unreported case of *Re Yong Tet Yin Ex-Parte United Overseas Bank Limited* [1996] 1 BLJ 158 (Bankruptcy Petition No. K 29(P)-197 of 1994), where he held that:

> ... As for the question of interest being statute-barred, even if I allow it to be considered it would nevertheless fail because the argument of the debtor was premised on Item 45 of the Schedule to the Sabah Limitation Ordinance which does not apply to a judgment or interest due on judgment. Interest due under judgment is governed by Item 98 and has a limitation of 12 years from the date of the judgment.

Similarly, in another unreported case of *Re Johan Hj Abd Hamid, Ex Parte Hong Leong Bank* (Bankruptcy Petition K 29-171-2007) Ian Chin J remarked that:

> ... There is no separate provision to govern the interest payable under judgment unlike the Malaysian Limitation Act 1953 section 6(3) which dealt specifically with the arrears of interest of a judgment and specified a six-year limitation period and with which provisions *United Malayan Corp Bhd v. Ernest Cheong Yong Yin* [2002] 2 MLJ 386 was concerned with. Thus, even assuming that all part payments made by the debtor subsequent to the judgment could not revive the limitation for interest due is correct, the debtor would still fail in his argument as the limitation is 12 years

The same principle was adopted and followed in the case of *Re Catherine L Masry Ex Parte Affin - ACF Finance Berhad* (unreported) by Clement Skinner J (as His Lordship then was).

[22] We share the same view. Thus, the reliance placed by the JD to the cases of *Re Lim Szu Ang, Ex p Kewangan Utama Bhd* [2005] 7 CLJ 23; *Re Yau Kin Mun, Ex p Public Bank Bhd* [1999] 3 CLJ 412; and *United Malayan Banking Corporation Bhd v. Ernest Cheong Yong Yin* [2002] 2 CLJ 413 FC does not lend credence to them as it clearly deals with statutes and provisions which are alien to the state of Sabah. On a similar note, we also find that the learned Judicial Commissioner had erred when she relied on the case of *Re Lim Szu Ang, Ex p Kewangan Utama Bhd (supra)* and concluded that Item 45 is akin to the second and first limb of s. 6(3) of the Limitation Act 1953.

[23] As for the other issues raised in this appeal ie, the issue of wrongful computation of interest and the BN being ambiguous and defective, we are of the view that it is too late in the day to raise these issues here at this point. The learned Judicial Commissioner had rightfully pointed out in her judgment that the JD having receipt of the BN and the affidavits by the JC had failed to reply to the same. The failure on their part to rebut the amount claimed by the JC would then mean it is deemed to be admitted.

[24] In the circumstances, we are unanimous in our decision that this appeal must succeed. We therefore allow the appeal with costs.